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THE HONORABLE THOMAS O. RICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DARRYL W. RISER, Plaintiff, v. WASHINGTON STATE UNIVERSITY, DON HOLBROOK, BRIAN ALLAN DIXON, and RANDI N. CROYLE, Defendants.	NO. 2:18-cv-00119-TOR DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION REGARDING DEFAMATION PER SE, LIBEL, AND SLANDER, AND INTENTIALLY CAUSING EMOTIONAL DISTRESS CLAIMS AGAINST DEFENDANTS HOLBROOK AND CROYLE – ECF NO. 33

I. INTRODUCTION

Plaintiff has moved for summary judgment against Defendant Holbrook and Croyle on claims of defamation per se, libel, slander, and intentionally causing emotional distress. ECF No. 33. However, Plaintiff fails to follow the applicable rules for summary judgment and does not present any admissible evidence in support of his motion. Furthermore, although Defendants dispute the accuracy of Plaintiff's unsupported allegations, they would not entitle Plaintiff to

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judgment as a matter of law even if presented in a manner that complies with the rules.

II. FACTUAL BACKGROUND

Plaintiff filed his Amended Complaint, ECF No. 18, on April 26, 2018. Defendants subsequently moved for dismissal of Plaintiff's Amended Complaint for failure to comply with Fed. R. Civ. P. 8, and in the alternative, for a more definite statement under Fed. R. Civ. P. 12(e). ECF No. 30. Defendants also included in that motion a request to strike improperly included attachments under Fed. R. Civ. P. 12(f).

On May 23, 3018, Plaintiff filed three motions for summary judgment. ECF Nos. 31, 32, 33. None of these motions included a separate statement of material facts, as required by LR 56.1(a). *Id.* Additionally, there was no effort to support any of the factual allegations in the motion with citations to a declaration, affidavit, or other admissible form of evidence, as required by LR 7.1(g) and Fed. R. Civ. P. 56(c)(1). Given the early state of the case, no scheduling order has been entered and no discovery has been conducted.

III. LEGAL ARGUMENT

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating

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the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Plaintiff has not met that burden.[1]

Fed. R. Civ. P. 56(c)(1) provides that when moving for summary judgment, a "party asserting that a fact cannot be or is genuinely disputed must support the assertion by… citing to particular parts of materials in the record." LR 7.1(g) similarly states that "[f]actual assertions contained in memoranda must be supported by evidence, such as a declaration, affidavit, or discovery response." Additionally, LR 56.1(a) provides that a party filing a motion for summary judgment must file a separate statement of facts, citing to and attaching portions of the record relied upon.

This is important, because a trial court can only consider admissible evidence in ruling on a motion for summary judgment. *See* Fed. R. Civ. P. 56(e); *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir.1988). Authentication is a "condition precedent to admissibility," *Alexander Dawson*,

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[1] Fed. R. Civ. P. 56 also contemplates that, prior to filing a motion for summary judgment, an opposing party should have a sufficient opportunity to discover information essential to its position. Fed. R. Civ. P. 56(d); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). That has not occurred here. However, Plaintiff's motion is deficient for a number of other more significant reasons.

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Inc. v. N.L.R.B., 586 F.2d 1300, 1302 (9th Cir. 1978), and this condition is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). "[D]ocuments authenticated through personal knowledge must be attached to an affidavit that meets the requirements of Fed. R. Civ. P. 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773–74 (9th Cir. 2002) (citation and internal quotations omitted). Unauthenticated documents cannot be considered in a motion for summary judgment. *See Cristobal v. Siegel*, 26 F.3d 1488, 1494 (9th Cir.1994); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773–74 (9th Cir. 2002).

"Under Rule 56 of the federal rules, a party against whom a motion for summary judgment is directed need not file any contravening affidavits or other material but is entitled to a denial of the motion for summary judgment where the movant's papers are insufficient on their face or themselves demonstrate the existence of a material issue of fact." *Hamilton v. Keystone Tankship Corp.*, 539 F.2d 684, 686 (9th Cir. 1976).

Here, like in *Hamilton*, there were no affidavits in support of the motion for summary judgment. Further, there was no proper foundation laid for authentication or admission of the purported exhibits. Some of Plaintiff's "Material Facts" had no cites at all. ECF No. 33 at 3-7. Plaintiff also failed to file a separate factual statement, as required by the local rules. Overall, Plaintiff's

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papers are insufficient on their face. Plaintiff has failed to comply with the requirements of Rule 56 and the applicable local rules. His motion should be denied.

A. Even with the facts alleged, Plaintiff is not entitled to judgment as a matter of law

Plaintiff makes an assortment of conclusory allegations that Defendants Holbrook and Croyle violated his rights. However, the facts as presented by Plaintiff do not establish he is entitled to judgment as a matter of law for any of the stated causes of action.

1. Defendants have Eleventh Amendment Immunity.

The Eleventh Amendment prohibits suit for damages against a state in Federal Court. *Keal v. State of Washington*, 2006 WL 2787830, at *2 (W.D. Wash. Sept. 26, 2006). Furthermore, individuals acting in their official capacity may not be sued for damages. *Brock v. Washington State Dep't of Corr*., 2009 WL 3429096, at *4 (W.D. Wash. Oct. 20, 2009). Defendants Holbrook and Croyle are individuals acting in their official capacity, and thus the claims against Defendants are barred under the Eleventh Amendment.

2. Plaintiff has not established the necessary elements for Defamation Per Se, Libel, or Slander.

A defamation claim has four elements: (1) a false and defamatory communication; (2) lack of privilege; (3) fault; and (4) damages. *Duc Tan v. Le*,

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177 Wash.2d 649, 662, 300 P.3d 356, 363 (2013). Libel and slander are separate causes of action for the same basic tort of defamation, each of which must be proven with the same elements. § 20:2 Libel, slander, and invasion of privacy—Distinctions, 16A Wash. Prac. Tort Law and Practice § 20:4 (4th ed.); RESTATEMENT (SECOND) OF TORTS § 568 (AM LAW INST. 1977); s*ee e.g.*, *Lopez v. City of Seattle*, 113 Wash. App. 1049, at *3–4 (2002) (unreported).

For the first element of a defamation claim, the plaintiff must prove that the statement is false and defamatory. Whether a statement is capable of being defamatory is a question of law for the court. *Amsbury v. Cowles Publishing Co.*, 76 Wash.2d 733, 740, 458 P.2d 882, 886 (1969). A statement is false if it incorrectly describes the act, condition, or event that it describes. *Schmalenberg v. Tacoma News, inc.*, 87 Wash. App.579, 592, 943 P.2d 350, 357 (1997). A statement is defamatory if it tends to harm the reputation of the plaintiff in his community or if it tends to deter third persons from associating or dealing with him. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wash.2d 370, 383, 46 P.3d 789, 795–96 (2002).

Concerning the second element, the plaintiff must prove that the statement is not privileged by showing that the statement was published. This means that the statement was communicated to one or more third parties. *Schmalenberg v. Tacoma News, Inc.*, 87 Wash. App. 579, 588, 943 P.2d 350, 356 (1997). However, discussions or communications among employees within an

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organization are not publication if the employees' communication is within the ordinary course of their work. *Doe v. Gonzaga University*, 143 Wash.2d 687, 702, 24 P.3d 390, 397 (2001), *judgment rev'd on other grounds,* 536 U.S. 273 (2002) (citing *Prins* as an example of this intra-organizational privilege).

For example, the Washington State Supreme Court held that communication sent from the main office of a company to its branch office regarding a manager's poor performance was not published communication. *Prins v. Holland-North America Mortgage Co.*, 107 Wash. 206, 208, 181 P. 680, 680 (1919). The alleged defamation was contained in a letter sent by the main office and read only by the plaintiff's co-manager and a bookkeeper. *Id.* at 107 Wash. 206, 207, 181 P. 680, 680. The *Prins* court held that there had been no publication of the allegedly defamatory statements because a corporation does not publish that which it sends using its own agents to another of its agents. *Id.* at 107 Wash. 206, 208, 181 P. 680, 680. This rule holds true so long as the employees who learn of the defamatory communication learn of it while acting within the scope of their employment. *See Gonzaga University*, 143 Wash.2d at 702, 24 P.3d at 397 (citing *Prins* as an example of this intra-organizational privilege).

Here, Plaintiff cannot establish that any of the statements he identifies were defamatory. They are not provably false statements, nor would they harm the reputation of the Plaintiff such that it would deter individuals from associating

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with him. Furthermore, there is no indication that any of the statements were published. In fact, many of the statements appear to be directed to the Plaintiff, rather than a third party. Regardless, prior to Plaintiff filing them in Federal Court, it does not appear that the statements Plaintiff takes issue with were disseminated beyond WSU employees working in the regular course of their jobs. Thus, an intra-organizational privilege applies. Without the first two elements, Plaintiff cannot establish a cause of action for defamation, libel, or slander. Defendant requests summary judgment for the non-moving party pursuant to Fed. R. Civ. P. 56(f).

3. Plaintiff has not established that he is entitled to judgment as a matter of law on a claim of intentionally causing emotional distress.

A claim for intentional infliction of emotional distress ("tort of outrage") has three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress." *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wash.2d 775, 792, 336 P.3d 1142, 1151 (2014) (citing *Kloepfel v. Bokor*, 149 Wash.2d 192, 66 P.3d 630 (2003)). For the defendant to be liable the conduct must have been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson*, 85 Wash.2d 52, 59, 530 P.2d 291, 295 (1975).

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Additionally, liability does not include "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id*.

In *Dicomes v. State*, the Washington State Supreme Court held that the delivery of a termination letter, as well as communication with the media about the employee's termination, did not constitute outrageous conduct by the state employer. 113 Wash.2d at 630, 782 P.2d at 1013. The plaintiff in that case argued that her termination and the media statement showed her to be an incompetent and disloyal employee, and that her employer prepared a false report about her solely for the purposes of embarrassing and humiliating the plaintiff. *Id.* The Court ruled that discharge by itself is insufficient to support an outrage claim. *Id.*; *see also Strong v. Terrell*, 147 Wash. App. 376, 195 P.3d 977 (2008) (transient or trivial emotional distress are insufficient to sustain a claim).

Plaintiff identifies the disciplinary actions against him and his termination as the outrageous conduct in question. However, this does not go beyond all possible bounds of decency. Rather than being "utterly intolerable in a civilized community," it is normal for an employer to discipline and/or terminate an employee who is failing to meet expectations. There is no indication that either of the Defendants acted recklessly or with intention to inflict emotional distress. Plaintiff's allegations are insufficient to establish a claim for extreme and outrageous conduct, and Defendants request summary judgment for the non-moving party pursuant to Fed. R. Civ. P. 56(f).

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IV. CONCLUSION

Plaintiff has not established that he is entitled to judgment as a matter of law on any of his claims against Defendants Holbrook and Croyle. He has failed to satisfy his requirements for summary judgment evidence under Fed. R. Civ. P. 56. Further, the facts as alleged by Plaintiff are insufficient to establish a violation of any of the causes of action he asserts, even if they were to be supported by admissible evidence. Defendants request that this Court grant summary judgment for Defendants under Fed. R. Civ. P. 56(f), or deny Plaintiff's motion.

DATED this 13th day of June, 2018.

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PROOF OF SERVICE

I certify that I electronically filed this document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 13th day of June, 2018.

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